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*Information kept by the companies, service providers and other persons*

60. Guernsey and Alderney companies maintain up-to-date identity information on their legal owners. Although Guernsey companies are not obliged to check the identity of their beneficial owners, most Guernsey companies must have a resident agent who needs to identify and keep records of the companies' beneficial owners. Alderney companies do not have similar obligations under the Alderney Companies Law, but they can only be formed with the consent of the GFSC, which carries out prior due diligence on the proposed beneficial owners of the company. In addition, financial services business (including fiduciary licensees) must observe customer due diligence requirements and are subject to the AML/CFT regulatory framework.

*The company and its members*

61. Guernsey Companies Law requires companies to maintain at their Guernsey registered office a register of members (legal owners), including their name and address, and the date on which a person became and ceased to be a member. Where the company has a share capital, the register must also contain a statement of the shares number, class and amount paid and unpaid on each share (section 123).

62. Where the company is a protected cell company, the register must distinguish between members of cells and members of the core (section 123). Similarly, an ICC must keep a register of the members of each of its ICs. When a company has more than 50 members, it must also maintain an index of members (for ICs, the obligation lies on the ICC).

63. Changes of ownership are effective once the name of the new member is entered in the company's register of members (section 121). The information must be maintained for ten years after a person ceased to be a member. A company which fails to maintain that information is guilty of a criminal offence. There is no obligation for the companies to check the identity of their beneficial owners, but they must keep a record of beneficial owners prepared by their resident agent (see below) at their registered office (section 487).

64. Under Alderney Companies Law, companies must keep a register of members (legal owners) at its registered office with the names and addresses of all persons who are or who have since the formation of the company been shareholders therein (sections 71 and 73) and changes must be effected within a period of 14 days from the receipt of written notice from the member (section 72). A company which fails to maintain that information is guilty of a criminal offence. There is no obligation for the companies to check the identity of their beneficial owners.

### Resident agent

65. A resident agent is mandatory for most Guernsey companies (and his/her identity must be notified to the Registrar; Guernsey Companies Law, sections 484 and 485). The resident agent must take reasonable steps to identify, and keep records of, the company's beneficial owners (sections 486-487) holding at least 10% of the total voting rights of all members eligible to vote at a general meeting. They are not required to keep records when the class of beneficial owners is "of such a size that it is not reasonably practicable to identify each member of the class" (section 487(5)), although the exact meaning of such an expression is unclear from the laws and regulations. The record of the beneficial ownership structure must contain:

- for individuals: the name, usual residential address, nationality and date of birth; and
- for companies (including overseas companies): corporate or firm name, registered or principal office, legal form and law by which it is governed, and if applicable, the register in which it is entered and its registration number.

66. The corporate legal owners have no duty to notify the resident agent of any change in their ownership structure, but the resident agent may give them notice, requiring that owner to disclose whether it holds its interest in the company for its own benefit or the benefit of another person, and if so, the details in respect of that person. Failure to answer the notice or a false answer is an offence (section 488) and should be reported to the company. In turn, the company may restrict the rights of the member or even cancel the member's interest in the company (section 489).

67. Companies not required to have a resident agent are those listed on a recognized stock exchange, open-ended or closed-ended investment companies (meaning a collective investment scheme which are currently supervised by the GFSC under the Protection of Investors (Bailiwick of Guernsey) Law, 1987) or any other prescribed category of company (which currently are GFSC supervised companies and States Trading Companies) and subsidiaries of these exempt companies (section 483).<sup>19</sup>

68. In addition, the resident agents must be either an individual director of the company (resident in Guernsey) or a CSP. Individual directors, as well

19. The standard does not create an obligation on the Contracting Parties to obtain or provide ownership information with respect to publicly traded companies or public collective investment funds or schemes unless such information can be obtained without giving rise to disproportionate difficulties (OECD Model TIEA, Article 5(4)).

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as CSPs, may be fiduciary licensees, and subject to AML laws and regulations (see Regulated business activities above).

#### Anti-money laundering regime

69. Guernsey has a significant insurance and investment fund business. Financial services business (including fiduciary licensees), as defined in Schedule 1 of the Criminal Justice (Proceeds of Crime) (Financial Services Businesses) (Bailiwick of Guernsey) Regulations, 2007 (FSB Regulations), are subject to the Bailiwick's AML/CFT regulatory framework.<sup>20</sup> This includes the following specific industry sectors:

- banking, including deposit taking business as defined in the Banking Supervision (Bailiwick of Guernsey) Law, 1994 (see section A.3. Banking information below);
- insurance business, as defined in the Insurance Business (Bailiwick of Guernsey) Law, 2002 or the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002. Insurance business in the Bailiwick can be divided into three distinct sectors: domestic insurance, international insurance and insurance intermediaries. As at 31 December 2009, there were 21 insurers engaged in domestic business, 355 licensed international insurers (most UK based groups, including 63 PCCs, five ICCs and six ICs), and 40 registered intermediaries. The GFSC supervises insurance business under the Insurance Business Law, 2002 and the Insurance Managers and Insurance Intermediaries Law, 2002.
- investment business and investment funds, including controlled investment business as defined in the Protection of Investors (Bailiwick of Guernsey) Law, 1987 (Protection of Investors Law). In the Bailiwick, collective investment funds may be established as unit trusts, investment companies (including PCCs and ICCs), or limited partnerships, and they may be organised as authorised or registered investment schemes as declared by the GFSC. Managers, trustees, and custodians of authorised and registered, open-ended and closed-ended schemes must be licensed under the Protection of Investors Law. Any changes to the directors, controllers, partners or managers of a fund must be notified to the GFSC within 14 days. The GFSC wields an array of enforcement measures including private warnings, public statements,

20. Criminal Justice (Proceeds of Crime) (Financial Services Businesses) (Bailiwick of Guernsey) Regulations, 2007 (FSB Regulations); Transfer of Funds (Guernsey) (Alderney) (Sark) Ordinances, 2007; and Disclosure (Bailiwick of Guernsey) Law and Regulations, 2007.

investigatory powers or cancellation of licences to oversee remedial measures.

- regulated activities, as defined in the Fiduciaries Law, including fiduciary and nominee services, trust and CSP; and
- non-regulated financial services businesses, as defined in the Registration of Non-Regulated Financial Services Businesses (Bailiwick of Guernsey) Law, 2008.

70. Companies and other entities in the Bailiwick may enter into a relationship with lawyers, accountants or estate agents (legal professionals), who in turn are subject to separate but similar sets of AML/CFT laws under the Prescribed Businesses (Bailiwick of Guernsey) Law, 2008 and the Criminal Justice (Proceeds of Crime) (Legal Professionals, Accountants, and Estate Agents) (Bailiwick of Guernsey) Regulations, 2008 (LEA Regulations).

71. When establishing a business relationship or carrying out an occasional transaction, financial services businesses and legal professionals must perform customer due diligence checks, as follows:<sup>21</sup>

- the individual customer (name, address, nationality, date and place of birth) and/or the non-individual customer (name, date and jurisdiction of incorporation, registered office address, legal status) are identified and verified;
- the beneficial owner and underlying principal are identified and reasonable measures are taken to verify such identity using identification data; such measures include, in the case of a legal person or legal arrangement, measures to understand the ownership and control structure of the customer.<sup>22</sup> The FSB Regulations define beneficial owners as the natural person who ultimately owns or controls the customer, but the FSB Handbook notes that in normal risk situations, beneficial owners are individuals ultimately holding at least 25% interest in the capital or net assets of the legal body.

21. Regulation 4(3) of the FSB Regulations and the LEA Regulations, supplemented by the Handbook for Financial Services Businesses on Countering of Financial Crime and Terrorist Financing ("FSB Handbook") and the Handbook for Legal Professionals, Accountants and Estate Agents on Countering of Financial Crime and Terrorist Financing ("LEA Handbook").
22. Where the customer is a collective investment scheme regulated by the GFSC or a listed company, the FSB may consider the legal body to be the principal to be identified and verified (FSB Handbook, paragraph 4.6.1), which is in line with the standard (Model TIEA, Article 5(4)).



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- the veil of nominees is pierced: (i) any person purporting to act on behalf of the customer is identified and his identity and his authority to so act is verified; and (ii) a determination is made as to whether the customer is acting on behalf of another person and, if the person is so acting, reasonable measures are taken to obtain sufficient identification data to identify and verify the identity of that other person.

72. In some instances the AML/CFT regime allows reliance on introducers, who may be outside the scope of the Bailiwick regulatory framework (Regulation 10) to have verified the identity of the customer, beneficial owners and any underlying principals. Such introducers must be (a) established in a jurisdiction listed in Appendix C to the FSB Handbook, which are considered by the GFSC to have in place AML/CFT legislation compliant with FATF Recommendations, currently comprising 31 jurisdictions; or (b) from a same group. The customer due diligence process can be waived for introduced businesses, *i.e.* if an introducer gives a written confirmation of identity and other matters,<sup>23</sup> provided that the introducer keeps such identification data and documents and make them available to the CSP or legal professional upon request and without delay (chapter 4 of the handbooks). The responsibility of complying with the above mentioned regulations remains with the licensee.

73. Financial services businesses and legal professionals must keep records for five years after the relationship with the customer ceased or the occasional transaction was completed (regulations 14 and 19) but they do not routinely/systematically maintain up-to-date information on the legal and beneficial ownership structure of their customers. Instead, changes in the ownership structure of the customers must be monitored on a risk-sensitive basis, *i.e.* the FSB Handbook (paragraphs 265-267) indicates that it is not necessary to re-verify or obtain current documentation unless an assessment has been made that the identification data held is not adequate for the assessed risk of the business relationship.

#### *Nominee identity information*

74. The provision of nominee services to any company (as well as partnerships, trusts or other unincorporated bodies), including acting as or providing nominee shareholders, is a regulated activity under section 2(1)(b)(ii)(C) of

23. The Handbook defines an introduced business relationship as a financial services business, lawyer or accountant acting on behalf of one or more third parties who are also its customers and establishes a business relationship on their behalf with a financial services business. Introducer relationships may be business relationships on behalf of a single third party or on behalf of more than one third party, including a pool of such persons.

the Fiduciary Law for which a license must be obtained. This law applies to persons providing nominee services in or from within the Bailiwick and to Bailiwick companies rendering such services in or from within any place in the world.

75. A person who acts as, or arranges for another person to act as, a nominee shareholder is subject to the fiduciary licensee obligations concerning identity information under the Fiduciaries Law and the AML/CFT regulatory framework. However, these obligations will not apply when the person providing nominee services is not carrying on such activity "by way of business". In that case, there are no obligations imposed on a nominee to retain identity information on the persons for whom they act as the legal owner.

76. Guernsey's authorities indicate that the object of excluding persons who were not acting "by way of business" was to exclude from the scope of regulation the occasions when people acting in their own private individual capacity undertake regulated activities. The expression "by way of business" is cast wide enough to catch situations where the person in question receives some form of consideration for the services performed: for the purposes of the Fiduciaries Law "a person who carries on any activity shall be deemed to do so by way of business if he receives any income, fee, emolument or other consideration in money or money's worth for doing so". Therefore the rules only exclude persons that perform services gratuitously or in the course of a purely private non-business relationship, and Guernsey's authorities consider that it would be impossible, and undesirable, to attempt to subject private individual functions or transactions which can arise on an everyday basis to mandatory licensing by the GFSC.

77. As only a limited number of nominees would be excluded from the scope of the Fiduciary Law, Guernsey's authorities consider that this exception is narrow and does not prevent effective EOI. The explanations given by Guernsey about the practical application of the rules and its impact on EOI will be reviewed in the Phase 2 of the review process.

#### *Bearer shares (ToR A.1.2)*

78. Bearer shares are implicitly prohibited under both the Guernsey and the Alderney Companies Law since the name of all members must be kept in the register of members. A Guernsey company which fails to maintain that information is guilty of a criminal offence (sections 123 and 72 respectively).

79. The FSB Handbook indicates that banks should only open accounts for companies or structures capable of issuing bearer instruments where the holders of the instruments are verified (paragraph 5.6). Banks should take steps to ensure that bearer instruments are held in secure custody by the bank

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or a trusted intermediary which has undertaken to inform the banks of any proposed change in ownership of the company or structure.

***Partnerships (ToR A.1.3)***

80. The Bailiwick of Guernsey currently has two types of partnerships: ordinary partnerships in the whole territory, and limited partnerships (LPs) in Guernsey. Whilst ordinary partnerships are not subject to registration in Guernsey (unless they perform a financial service business), LPs are registered with the Greffier (a function shortly to be transferred to the Registrar of Companies). The general partners of the LP must file a declaration stating, inter alia, details of the general partners. There is no requirement to file details of the names of the limited partners or their capital contributions in the declaration form, but LPs maintain a register of limited partners. Neither ordinary nor limited partnerships are required to submit partnership tax returns to the Director of Income Tax. However, their partners must include their share of the partnership's income into their tax return.

***Ordinary partnerships***

81. In Guernsey, ordinary "trading" partnerships are governed by the terms of the Partnership (Guernsey) Law, 1995 (Partnership Law), which was enacted to codify and clarify the customary law on partnerships. There is no statutory partnership law in Alderney but a partnership formed therein under customary law is similar to a Guernsey partnership formed under the Partnership Law, as the customary law of Alderney is the same as that of Guernsey. The below paragraphs apply to all ordinary partnerships.

***Information held by public authorities***

82. Ordinary partnerships are not registered by a public authority (neither the States of Guernsey nor the GFSC) unless their activities are specifically covered by statute (for example, in the case of a financial services business). Partnerships have no legal personality and the partners are taxed on their separate shares of the partnership's income on the basis of the partner's residence and subject to the ordinary principles of the Income Tax (Guernsey) Law, 1975 (sections 42 and 137). The tax authorities know whether an individual or legal entity is a partner in a partnership, where the partner is liable to tax in respect of a share of the partnership income. The income tax return requires each partner to provide "a copy of the accounts and computations". In practice, the Director of Income Tax ordinarily receives a set of partnership accounts showing the profits of the partnership and an allocation of the shares to the individual partners, to which each individual partner can refer, in order to dispense with the requirement for him/her to send the accounts

him/herself. This measure avoids the Income Tax Office receiving multiple sets of the same accounts. As a result, the tax authorities do maintain ownership information of general partnership, updated every year.

#### Information held by the partners and service providers

83. There are no specific requirements for partnerships to retain information under the Partnership Law. When acting as a partner of a local or foreign partnership by way of business, a person holding a fiduciary licence is subject to the obligations mentioned above concerning the acquisition, retention and production of information arising under the Fiduciaries Law and the AML/CFT regime; and the partnership itself may be subject to specific statutory obligations (for example, as in the case of a financial services business).

#### *Limited Partnerships in Guernsey*

84. Under the Limited Partnerships (Guernsey) Law, 1995, LPs may be created in Guernsey. Although LPs generally do not have separate legal personality, they may elect to have one when formed (section 9A). However, this does not change the liabilities of the general or limited partners, nor does it affect the relationship between them. There are 1 086 LPs registered in Guernsey (approximately 200 with legal personality), a significant number of which are collective investment schemes.

#### Information held by public authorities

85. LPs must have at least one general partner and one limited partner (either one could be an individual, company or partnership), and be created by a written partnership agreement (section 2(2) of Limited Partnership (Guernsey) Law 1995). In essence the general partner operates the business while the limited partners are passive investors in the operation.<sup>24</sup>

86. LPs must be registered with the Greffier. The application for registration must contain the name and address of every general partner, in addition to the name and registered office of the LP, its nature and principal place of business, and the duration of the partnership (section 8). The Registrar does not hold identity information on limited partners; the obligation to maintain that information rests on the partnership (see below).

24. The general partners are jointly and severally liable for the debts of the partnership. The limited partners contribute capital to the partnership but are not liable beyond that amount for the debts of the limited partnership. The limited partners obtain the benefit of limited liability but they may not participate in the management of the partnership.



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87. The absence of registration prevents the limited partners from having limited liability and all partners are deemed to be general partners (section 11). Changes to the address of the registered office or of a general partner must be notified to the Registrar within 21 days of the change. The absence of notification is an offence punishable on summary conviction to a fine up to GBP 10 000 (applicable to the partnership and each general partner).

88. All LPs must file an annual return in order to remain in good standing, pursuant to the Limited Partnerships (Fees and Annual Return) (Guernsey) Regulations, 2008. The annual return must contain the updated identity information on the general partners, as well as a statement of whether or not the LP has complied with its obligation to keep a register of limited partners and accounting records. The Register of Limited Partnerships is publicly available and may be searched online upon the payment of a small fee.

89. Like ordinary partnerships (see above), partners of an LP must include their share of the partnership's income in their tax return, but the LP itself does not fill in an information statement indicating the name and share of income of each of its partners. A limited partner which is a non-resident company or an individual not solely or principally resident in Guernsey is not liable to tax in Guernsey provided that the income obtained through the LP is wholly derived from international operations (section 5(1B) of the Income Tax Law). In such instances, Guernsey public authorities will have no information on limited partners.

#### Information held by the partners and service providers

90. Every LP must keep at its registered office a register of all limited partners showing their full names and addresses, and the capital account of each of them with details of the amounts and dates of the (planned) contributions and payments representing a return thereof (sections 15 and 23). The records maintained at the LP's registered office are available for inspection by any partner (section 15(2)). Contravention to properly maintain the register of limited partners is an offence punishable on summary conviction to a fine up to GBP 10 000 (applicable to the partnership and each general partner). General partners holding a fiduciary licence are also subject to licensing obligations arising under the Fiduciaries Law (see paragraphs 55-59 above), as well as to obligations concerning the acquisition, retention and production of information under the AML/CFT regime (see paragraph 73 above). Limited partners are exempt (unless they are themselves carrying on a regulated activity, financial services business or prescribed business).

*Trusts (ToR A.1.4)*

91. The Trusts (Guernsey) Law, 2007 (Trusts Law) contains the statutory provisions relating to the creation and governance of trusts in the island of Guernsey, and permits both standard and purpose trusts to be created. There is no trust legislation in Alderney and Herm, thus it is only possible to set up trusts therein under customary law.

92. Trusts have no legal personality and are not of themselves subject to a system of registration. Under the Income Tax Law, there is a general requirement to file an income tax return upon the trustees themselves, and the beneficiary (or the settlor, if the trust is revocable), but the Director of Income Tax may exempt trustees from this obligation if there are no Guernsey resident beneficiaries and the trust has no (taxable) Guernsey sources of income. Nevertheless, fiduciary licensees performing regulated activities (including trust-related activities such as acting as a trustee) are subject to the AML/CFT regulatory framework, under which trustees need to hold sufficiently detailed identity information on settlor(s), protector(s), co-trustee(s), and beneficiaries with a vested interest.

*Trust ownership and identity information required to be provided to government authorities*

93. Trusts are not subject to a system of registration.<sup>25</sup> Formal documents are not essential for the establishment of trusts in Guernsey, unless they are unit trusts or hold real property in Guernsey (Trusts Law, section 6). The most common form of Guernsey trust is the private discretionary trust. Besides their private use in family situations, increasing use has been made of trusts as investment vehicles (collective investment funds) and for company pension schemes, retirement annuities and employee benefit schemes. Guernsey trusts with both local and international beneficiaries are commonly managed by professional licensed fiduciaries situated in Guernsey.

94. In principle, the Income Tax Law (sections 53 and 65) imposes a requirement to file an income tax return either upon the trustees themselves, the beneficiary, or the settlor (in the case of a revocable settlement), on his/her own personal return. However, the Director of Income Tax has issued a Statement of Practice which provides concessionary treatment whereby, if he is satisfied that there are no Guernsey resident beneficiaries<sup>26</sup> of a

25. Nevertheless, trusts may themselves be subject to licensing and regulation under specific regulatory enactments, *e.g.* in the case of a collective investment scheme, subject to licensing/authorisation under the Protection of Investors Law, 1987.

26. The personal income tax return issued to individuals subject to Guernsey tax contains a section requiring them to declare any interest they may have in a

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trust, and the trust has no (taxable) Guernsey sources of income, he will not seek to charge the income of the trust to Guernsey income tax. In such circumstances, there will be no requirement to file a tax return and the competent authorities will have no record of the identity of the trustees, beneficiaries, settlor(s) or protector(s).

*Trust ownership and identity information required to be retained by the trust*

95. In general, there are no restrictions in the Trusts Law as to who may act as trustee, save that a trustee must be a natural or legal person. Guernsey's authorities have explained that there is a customary fiduciary obligation imposed on trustees to know the identity of the settlor and (where they exist) the beneficiaries in order for the trust to have certainty evidenced by the case of *Re Double Happiness Trust*<sup>27</sup> which has effect in Guernsey.<sup>28</sup> Trustees that perform regulated activities (Fiduciaries Law, section 2) and persons acting as trustee or providing trustees must be licensed by the GFSC and are subject to the obligations detailed in paragraph 73 above concerning the acquisition, retention and production of information arising under the Fiduciaries Law and the AML/CFT regime.

96. As concerns trusts in particular, the FSB Handbook provides that, when establishing a trust relationship, licensed fiduciaries which are acting as trustees must identify and verify the identity of their clients and any beneficial owner and underlying principal, including the settlor(s), any protector(s) or co-trustee(s), and any beneficiaries with a vested interest (paragraph 4.6.3).

97. Furthermore, the licensed fiduciaries dealing with trusts must (paragraph 4.6.4): (i) verify the identity of the trustees (unless these trustees are themselves subject to the handbooks or carry on business from countries listed on Appendix C of the handbooks, i.e. which have in place AML/CFT legislation compliant with FATF Recommendations); (ii) identify and verify the underlying principals and beneficial owners, i.e. the settlor(s), any protector(s) or trustee(s) and any beneficiary with a vested interest or who is likely to benefit from the trust; and (iii) understand the nature of the trust structure and the nature and purpose of activities undertaken by the structure.

settlement, including a trust. This therefore enables the Director to identify trusts which may have a liability to Guernsey income tax.

27. In *Re Double Happiness Trust* (2002) JLR note, the Jersey Royal Court declared that if the identity of the beneficiaries or beneficial interests are not certain then the trust will be void.
28. In accordance with *Morton v. Paint* (1996) 21 GLJ 61, which permits the Courts of Guernsey to follow the relevant cases of other comparable jurisdictions to determine the matter for them if there is no Guernsey authority on the issue.

98. Where a foreign trust (usually from the United Kingdom or Jersey) is administered by a Bailiwick-licensed fiduciary, it will be subject to the AML/CFT regime (see paragraph 73). A foreign law trust is generally enforceable in Guernsey.<sup>29</sup> The Royal Court of Guernsey has jurisdiction over trusts formed under the laws of other jurisdictions to the extent that such trusts have Guernsey-resident trustees or property situated or administered in Guernsey or where the terms of the trust give the Royal Court jurisdiction (Trusts Law, section 4).

99. However, trustees (and persons acting as trustee or providing trustees) of a Guernsey, Alderney, Herm or foreign trust can be unregulated persons, if they were not doing so "by way of business" or if the activity falls within one of the specified exemptions to the "regulated activities" set out in section 3 of the Fiduciaries Law. In those circumstances, the trust will not be subject to Guernsey's AML/CFT framework unless it were to: (i) open an account or establish a relationship with a Guernsey bank or other licensed fiduciaries subject to the AML/CFT framework, or (ii) purchase any real property in Guernsey, Alderney or Herm via a lawyer and estate agent who would also be subject to the AML/CFT framework.

100. Guernsey's authorities are of the view that these exceptions are limited to a narrow class of cases where licensing or regulation was not considered necessary or cases in which government has no legitimate interest or concern. For instance, the formation of a trust can occur in everyday private domestic situations (e.g. where parents receive gifts on behalf of their children) to which it is not felt appropriate to subject the trustees to regulation and licensing. They add that it is extremely improbable that a trustee acting in a private capacity and not acting "by way of business" will not know who the underlying principal/settlor of the trust is. Guernsey's authorities similarly consider it almost inconceivable that a person acting as trustee for a non Guernsey resident will not be acting by way of business, and thus caught by the Fiduciaries Law.

101. As for the exempted activities under section 3 of the Fiduciaries Law, they concern activities regulated by other means, such as (i) acting as a trustee or custodian of a collective investment scheme authorised by the GFSC under the Protection of Investors law; (ii) acting as trustee of testamentary trusts created by the will of a person who was resident or domiciled in the Bailiwick at the time of the execution of the will or at the time of death, provided that the person so acting is a lawyer.

29. Except where: it purports to do anything contrary to the law of Guernsey; it confers any right or function the exercise of which would be contrary to the law of Guernsey; or the Royal Court declares that it is immoral or contrary to public policy (Trusts Law, section 65).



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102. As only a limited number of trustees would be excluded from the scope of the Fiduciary Law, Guernsey's authorities consider that this exception is narrow and does not prevent effective EOI. Moreover, Guernsey maintains that all trustees of Guernsey trusts are required to have information on the settlor and (where they exist) the beneficiaries under customary fiduciary obligation. The explanations given by Guernsey about the practical application of the rules and its impact on EOI will be reviewed in the Phase 2 of the review process.

103. The mechanisms described above in Guernsey ensure the availability of information on trusts, whether Guernsey or foreign law trusts, where significant elements of the trust such as the residence of its trustees are connected with Guernsey. Nevertheless, it is conceivable that a trust could be created which has no connection with Guernsey other than that the settlor chooses that the trust will be governed by the laws of Guernsey. In that event there may be no information about the trust available in Guernsey.

***Foundations (ToR A.1.5)***

104. There are currently no foundations in the Bailiwick of Guernsey. Guernsey's legislative assembly has resolved to introduce foundations but the law has not yet been introduced, nor the details of the policy confirmed. The foundations legislation is presently awaiting drafting capacity in the Law Officers Chambers. Guernsey's authorities indicate that the new legislation (applicable to Guernsey) will include similar record keeping and reporting requirements as in the Guernsey Companies Law and will also be subject to the Bailiwick's AML/CFT framework, in the same manner and in the same circumstances as these apply to any other legal and natural person.

***Enforcement provisions to ensure availability of information (ToR A.1.6)***

105. Guernsey should have in place effective enforcement provisions to ensure the availability of ownership and identity information, one possibility among others being sufficiently strong compulsory powers to access the information. This subsection of the report assesses whether the provisions requiring the availability of information with the public authorities or within the entities reviewed in section A.1 are enforceable and failures are punishable. Questions linked to access are dealt with in Part B.

*Registration*

106. The Registrar of Companies has power to request the production of and otherwise obtain such documents, accounts and information which are necessary for the purpose of exercising its functions. However, when receiving an application for incorporation of a company or LP, the Registrar may rely upon the declaration of compliance in all respects and accordingly is not bound to enquire further as to whether, in relation to any application for incorporation, the provisions of the laws have been complied with. This does not prevent the Registrar from rejecting an application or validation when it considers that the provisions of the law have not been complied with (section 19(2), 500 and 505 of Guernsey Companies Law; section 8(5) of the Limited Partnership Law).

107. Failure to comply with a number of provisions of the Guernsey Companies Law is a criminal offence that on summary conviction entails (similar penalties apply as concerns LPs):<sup>30</sup>

- a fine up to GBP 1 000 against companies that fail to (properly) keep a register of members, and fail to notify the Registrar of a change of director.
- a fine up to GBP 10 000 against:
  - a person, who makes a false declaration of compliance concerning a registration application or annual validation;
  - companies that fail to have a resident agent or to notify the Registrar of its change;
  - members, who fail to disclose beneficial ownership information to the resident agent and resident agents who fail to disclose this information to law enforcement authorities.
- a fine up to GBP 10 000, imprisonment up to three months or both against a person who provides false or misleading information to the Registrar or the GFSC.

108. When a resident agent fails to maintain a record of beneficial owners, different sanctions may apply, depending on whether he is a locally resident individual director or a CSP. Individuals who fail to comply with their obligations as resident agents may be disqualified from acting as a director in Guernsey for a period of up to 15 years (sections 427-429). A CSP which fails to comply with its obligations as resident agent will also fail to meet the

30. Section 513 of the Guernsey Companies Law, in conjunction with the Uniform Scale of Fines Law.

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standards required by the Fiduciaries Law (Schedule 1, section 1) and may be subject to different sanctions (see paragraph 114 below).

109. Whenever a company or an LP has committed an offence under the Income Tax Law, and it is proved that it has been committed with the consent, connivance of, or is due to the negligence of a director, manager, secretary, etc. of the company, this person is also punishable (section 208A). The Companies, Limited Partnership and regulatory Laws contain the same provision.

110. The Registrar has the power to make orders directing payment of civil penalties, for instance when a company fails to notify a change of director or resident agent to the Registrar or does not complete an annual validation of the data maintained by the Registrar. A company is however not liable to a civil penalty if a prosecution in respect of the matter has been commenced.<sup>31</sup>

111. In addition the Registrar can strike a company off the Register where the company has failed to submit an annual validation or to have a resident agent; or is persistently in contravention with the law (sections 355 and 519). If the company is struck off the Register its assets become *bona vacantia* belonging to the Crown. The same does not apply to LPs.

#### *Licensing*

112. The GFSC has investigation and seizure powers to obtain information relating to the supervision of financial services business in and outside the Bailiwick.<sup>32</sup> The regulatory requirements on record keeping as set out above as well as the AML/CFT regime overseen by the GFSC are applicable throughout the Bailiwick. Site visits may take place at any or all of the premises where business is conducted or records are maintained by the licensee or associated party (or any person acting on their behalf) and are not limited to premises in the Bailiwick (section 1(2)). Any person who without reasonable excuse obstructs or fails to comply with the GFSC's information request is guilty of an offence and liable to imprisonment for up to six months and/or a fine not exceeding GBP 10 000 on summary conviction, or imprisonment for a maximum of two years and/or a fine of any magnitude on conviction on indictment.

31. Sections 145, 237, 485, 516-518. In default of payment, the Registrar may enforce payment as if it were a civil debt.

32. Financial Services Commission (Bailiwick of Guernsey) Law, 1987, section 8; Financial Services Commission (Site Visits) (Bailiwick of Guernsey) Ordinance of 2008.

113. The consequences of any significant failure to meet the standards required by the Fiduciaries Law (Schedule 1, section 1), the handbooks and the relevant enactments include: (i) cancellation of the fiduciary licence; (ii) Public Statements made under section 11C of the Financial Services Commission Law; or (iii) imposition of a financial penalty of up to GBP 200 000 (section 11D). Furthermore, a person who performs a regulated activity without obtaining a fiduciary licence from the GFSC or in contravention of the conditions of such a licence is guilty of an offence and may be required to:

- repay monies accepted from or paid over by clients (section 1(3) in conjunction with section 32);
- on summary conviction, pay a fine not exceeding GBP 10 000 and/or be liable to imprisonment for a term not exceeding three months (section 1(3) in conjunction with section 47); or
- on conviction on indictment, pay a fine of any magnitude and/or be liable to imprisonment for a term not exceeding two years (section 1(3) in conjunction with section 47).

#### Determination and factors underlying recommendations

Phase 1 Determination
The element is in place.

#### A.2. Accounting records

Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements.

114. A condition for exchange of information for tax purposes to be effective, is that reliable information, foreseeably relevant to the tax requirements of a requesting jurisdiction is available, or can be made available, in a timely manner. This requires clear rules regarding the maintenance of accounting records. The obligation to maintain reliable accounting records are found in most of the laws governing the various types of entities covered by this report, and in the Income Tax Law.



*General requirements (ToR A.2.1)**Relevant entities' governing laws*

115. Every Guernsey company must keep accounting records which are sufficient to show and explain its transactions and which are such as to disclose with reasonable accuracy, at any time, the financial position of the company at that time (section 238 of the Guernsey Companies Law). The accounting records must be kept at the company's registered office or in such other place as the directors think fit (sections 30 and 239). If the records are kept at a place outside Guernsey, a copy updated at least every six months must be kept in Guernsey. A company which fails to keep accounting records is guilty of an offence and liable on summary conviction to a fine up to GBP 10 000 (section 242).

116. In addition, companies must prepare individual or consolidated accounts in accordance with generally accepted accounting principles (Generally Accepted Accounting Principles or International Financial Reporting Standards) that include a profit and loss account and a balance sheet (section 243).

117. Under the Alderney Companies Law, companies need to keep accounting records at their registered office (or other appropriate place) which are sufficient to show and explain the company's transactions for a period of at least six years from the date on which they are made (section 74). A company which contravenes this provision is guilty of an offence and liable on summary conviction to a fine not exceeding GBP 5 000 (section 155(b)).

118. LPs must keep accounting records (i) sufficient to show and explain the partnership's transactions, (ii) such as to disclose with reasonable accuracy the partnership's financial position at any time, and (iii) sufficient to ensure that the partnership's balance sheet and profit and loss account are prepared properly (Limited Partnerships Law, section 15). Records must be kept in Guernsey, or, if kept abroad, accounts must be sent to Guernsey at least every six months.

119. In an ordinary partnership, partners must render true accounts and full information of all things affecting the partnership to any partner or his personal representatives (Partnership Law, section 27). There is no general obligation to keep books and records in Guernsey.

120. The Trusts Law requires trustees to keep accurate accounts and records of their trusteeship (section 25). Guernsey's authorities interpret this provision, together with the obligation of trustees to give information to other persons concerned with the trust (section 26), as requiring that all documentation and records necessary to enable the trustee fully and accurately to account to the beneficiaries as to the state and amount of the trust property

must be retained and available. There is no requirement that the records be kept in Guernsey. Whilst all trustees are subject to a fiduciary duty to keep accurate accounts and records, the extent of such requirements could not be ascertained during the Phase 1 Peer Review. An in-depth assessment of the effectiveness of this common law regime will be considered as part of the Phase 2 Peer Review of Guernsey.

121. Where a charity entity (company, partnership or trust) is required to register under the NPO Law, it must make, keep and retain records of all financial transactions (with whosoever made) in order to evidence the application or use of the organisation's assets, funds and income (NPO Law, Schedule 1, section 8(1)). Such records must be sufficiently detailed to enable verification that the organisation's assets, funds and income have been applied or used in a manner consistent with the purposes, objectives and objects of the organisation, as stated (section 8(2)(b)).

122. Under the AML/CFT regime, financial services businesses and lawyers, accountants and estate agents are obliged to keep records of documents on their transactions carried out with, by or on behalf of their clients, in the course of both domestic and international business (FSB Regulation 14, as clarified by the FSB Handbook). Such records must include: (i) the name and address of the customer, beneficial owner and underlying principal; (ii) if a monetary transaction, its amount; (iii) an account name and number by which it can be identified; (iv) details of the counterparty, including account details; and (v) the date of the transaction.

#### *Tax law*

123. The Income Tax Law itself does not impose any obligation to keep accounting records. It nonetheless provides that every person required to fill in a tax return must furnish to the Director of Income Tax such accounts or other information as he may require (certified, if he so requires, by an accountant, who is in turn subject to the AML/CFT regime; section 68). In practice, any person carrying on a business (whether an individual, a partner of a partnership or a company) must submit their accounts together with their tax returns. Companies are also required to submit a copy of the annual financial accounts along with the income tax return form.

124. The Income Tax (Keeping of Records, etc) (Guernsey) Regulations, 2006 (Record Keeping Regulations) impose some obligations to keep particular records and underlying documents, varying according to the type of income. The requirements are the same whether a business is carried on in Guernsey or elsewhere, and the records should be updated regularly. The Record Keeping Regulations require any persons filing a tax return to retain all records (and supporting documents) in respect of their business

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and property income (sections 1 and 2) but only records which were used in making the entries on their tax return in respect of other income (section 3). Therefore, such regulations do not impose an obligation to keep records with respect to income from sources other than businesses and property that trace financial transactions not relevant for tax purposes (e.g. non-business expenses that are not linked to a deduction claim).

*Underlying documentation (ToR A.2.2)*

125. The Guernsey Companies Law, the Alderney Company Law, the Partnership Law, the Limited Partnership Law and the Trusts Law do not expressly impose an obligation to retain underlying documentation, such as invoices, contracts, etc. In particular, the Guernsey Companies Law does not expressly impose an obligation that accounting records reflect details of all sums of money received and expended, all sales and purchases and other transactions, and the assets and liabilities of the company.

126. LPs must keep accounting records that contain day to day entries of all monies received and expended (Limited Partnerships Law, section 15).

127. According to Guernsey's authorities, the fiduciary duty of directors of companies, partners or partnerships and trustees, would extend to the keeping of underlying documentation. Directors of companies in Guernsey and Alderney have a fiduciary duty to act in good faith in the best interest of the company and to promote the success of the company. According to Guernsey authorities, this duty requires the directors to ensure that the "accounting records" include sufficient information to enable it to comply with its lawful obligations as well as ensuring that proper financial controls are maintained. Guernsey's authorities have indicated that the term "accounting records" means not only the books of account/nominal and other ledgers, but also the underlying documentation (primary records including invoices, cheque stubs, banks statements etc.) which support whatever is posted to the books.<sup>33</sup>

128. No case law or other authoritative sources have been provided to support this interpretation and in the absence of an express statutory provision, including on the retention period for such documents, it remains unclear whether the obligation of Guernsey entities to maintain underlying documentation.

129. Under the Record Keeping Regulations, any person filing a tax return is required to keep all supporting documents relating to the records mentioned above (i.e. in connection with business and property income). In

33. The Guernsey Society of Chartered and Certified Accountants has also confirmed that, as a matter of practice, it regards the term "accounting records" as including the underlying documentation in line with the fiduciary duties.

respect of income from other sources (other than business and property) only records that trace financial transactions relevant for tax purposes must be maintained.

*5-year retention standard (ToR A.2.3)*

130. Guernsey companies and LPs must keep their accounting records for at least six years.<sup>34</sup> A trustee is under an implicit duty to keep such records for the duration of his role (Trusts Law, section 25). Under the NPO Law, records must be retained for six years. Under the AML/CFT regime, financial services businesses must keep transaction documents for a minimum of five years. It is noted, however, that these record-keeping obligations are not expressly extended under the laws mentioned in this paragraph to cover underlying documentation.

131. The Record Keeping Regulations require persons who complete Guernsey income tax returns (e.g. companies, partners<sup>35</sup> and trustees) to maintain accounting records and underlying documentation relating to income derived from businesses and the letting of property for six years from the end of the year in which they file the relevant tax return (sections 1 and 2). Trusts and partnerships are not required to file income tax returns and are thus not covered by this obligation as they are not legal persons.

132. Documentation relating to other income must be kept for two years only from the end of the year in which they file the relevant tax return (section 3). Therefore the two years retention period for accounting records imposed by the Record Keeping Regulations applies only in practice to companies and trustees<sup>36</sup> deriving their income from sources other than businesses and property.

34. Section 239 of the Guernsey Companies Law and section 15 of the Limited Partnership Law, respectively. If a company is wound up and struck off for any reason, its property becomes bona vacancia and belongs to the Crown (and in practice administered by Her Majesty's Receiver-General, section 369). Guernsey authorities indicate that this includes accounting records.
35. This includes partners of a partnership, as it is implicit in the nature of the partnership that partners are carrying on a business (section 1(1) of the Partnership Law).
36. Under section 1(1) of the Partnerships Law, a partnership "is the relationship which exists between persons carrying on a business in common with the view to a profit". Therefore, income derived from a partnership is by definition business income and the obligation to maintain accounting records and underlying documentation for six years from the end of the year in which they file the relevant tax return (sections 1 and 2) applies to all income,



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## Determination and factors underlying recommendations

Phase 1 Determination	
The element is in place, but certain aspects of the legal implementation of the element need improvement.	
Factors underlying recommendations	Recommendations
Obligations to maintain reliable accounting records including underlying documents in line with the Terms of Reference are not consistently in place for relevant entities and arrangements in all instances.	Introduce consistent obligations for all relevant entities and arrangements to maintain reliable accounting records, including underlying documents in line with the Terms of Reference.
There is currently no express obligation for companies deriving their income from sources other than businesses and property to keep underlying documents for more than two years nor trustees deriving their income from sources other than businesses and property to keep accounting records and underlying documents for more than two years.	Clarify binding requirements on companies deriving their income from sources other than businesses and property to keep underlying documents for at least five years and on trustees deriving their income from sources other than businesses and property to keep accounting records and underlying documents for at least five years.

## A.3. Banking information

*Record-keeping requirements (ToR A.3.1)**Banking laws*

133. There are 44 banks in the Bailiwick, all deposit-taking businesses,<sup>37</sup> currently licensed under the Banking Supervision (Bailiwick of Guernsey) Law, 1994 (Banking Supervision Law). In order to perform their activities, deposit-taking businesses must obtain a licence granted by the GFSC (sections 1 and 6) and meet the minimum criteria for licensing under Schedule 3, which include maintaining systems of control and record keeping of the institution for business undertaken or contemplated and developing such systems (sections 4(3) and (4)(b)). When establishing a business relationship

37. As defined in section 3. Collective investment schemes are subject to similar obligations under the Protection of Investors Law.

or carrying out an occasional transaction, financial services businesses must perform customer due diligence checks, as described in paragraph 73 above.

134. Under section 36A, the GFSC issued in 2003 a Code of Practice to provide licensed banks with guidance as to their duties, the requirements and standards to be complied with and the procedures to be observed (e.g. identification, record-keeping, etc.). The Code of Practice sets out the obligations in respect of record keeping, which include that the licensed banks should (paragraphs 4 and 5):

- keep and preserve appropriate records of their business for at least the periods required by applicable law; ensure that policies, practices and procedures include a sound and adequately controlled credit granting and investment process; and
- ensure that the assessment of any credit decision includes not only an assessment of the identity and geographical location of the borrower and other parties involved in the credit transaction, but also of the quality and geographical location of any assets forming the collateral for such credit transactions (for example the quality, type and location of any property and real estate).

135. Whilst the contravention of the provisions of the code is not in itself considered an offence, this can be taken into account by the courts in determining any questions arising in any legal proceedings, criminal or otherwise (section 36A(4)). Therefore, contravening the code can be used as evidence against the licensed bank.

136. In addition, regulation 14 of the Criminal Justice (Proceeds of Crime) (Financial Services Businesses) (Bailiwick of Guernsey) Regulations, 2007 requires that a financial services business keeps a "transaction document" or a copy thereof for five years.

#### *Transfer of funds*

137. Under the Transfer of Funds (Guernsey) and (Alderney) Ordinances, 2007 (section 2), any transfers of funds in any currency which are sent or received by a payment service provider established in Guernsey and Alderney must be accompanied by complete information on the payer, including name, address and account number.<sup>38</sup>

38. Except that: the address of the payer may be substituted with his date and place of birth (where relevant), his customer identification number or national identity number, and, where the payer does not have an account number, the payment service provider of the payer shall substitute it with a unique identifier, which allows the transaction in question to be traced back to that payer.

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138. The payment service provider of the payer must, before transferring any funds, verify the complete information on the payer and such verification must be on the basis of documents, data or other information obtained from a reliable and independent source (section 2(3)), subject to a *de minimis* limitation of EUR 1 000 (section 2(5)). Where information on the payer accompanying a transfer of funds is missing or incomplete, the payment service provider of the payee must take this into account in assessing whether the transfer of funds, or any related transaction, is suspicious, and whether, accordingly, a disclosure is required under the AML/CFT legislation (section 7(1)).

139. The payment service providers of the payer (section 2(6)) and the payee (section 7(2)) must keep records of any information received by it on the payer for five years from the date of the transfer of funds in question. Unjustified failure to comply with the requirements described above is considered an offence, punishable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding GBP 10 000 or both, or punishable on conviction on indictment to imprisonment for a term not exceeding five years, a fine or both.

*Anti-money laundering and countering the financing of terrorism regime*

140. Under the AML/CFT regime, a bank engaged in a “correspondent banking” relationship<sup>39</sup> must take additional steps in relation to enhanced customer due diligence including gathering sufficient information about a respondent institution to understand fully the nature of the respondent’s business and documenting the respective AML/CFT responsibilities of each institution (FSB Handbook, paragraph 5.4).

141. Furthermore, banks are forbidden to (sections 8(1) and 8(2) of the FSB Regulations):

- set up anonymous accounts or accounts in names which it knows, or has reasonable cause to suspect, to be fictitious,
- enter into, or continue, a correspondent banking relationship with a shell bank<sup>40</sup> or with a respondent bank known to permit its accounts to be used by a shell bank.

39. A “correspondent banking” is a relationship which involves the provision of services by one bank (correspondent bank) to another bank (respondent bank) (section 5(1) of the FSB Regulations).

40. Defined under section 8(3)(c) as a bank that has no physical presence in the country or territory in which it is incorporated and licensed and which is not a

142. The combination of the AML/CFT legislation as well as the regulatory regime for licensed banks and other financial institutions ensures that all records pertaining to accounts as well as related financial and transactional information are available.

**Determination and factors underlying recommendations**

Phase 1 Determination
The element is in place.

member of a group of bodies corporate which is subject to effective consolidated supervision.



## B. Access to Information

### Overview

143. A variety of information may be needed in a tax enquiry and jurisdictions should have the authority to obtain all such information. This includes information held by banks and other financial institutions as well as information concerning the ownership of companies or the identity of interest holders in other persons or entities, such as partnerships and trusts, as well as accounting information in respect of all such entities. This section of the report examines whether Guernsey's legal and regulatory framework gives to the authorities access powers that cover the right types of persons and information and whether rights and safeguards would be compatible with effective exchange of information. As noted in the introduction, Guernsey and Alderney are a single jurisdiction for taxation purposes. They have a single competent authority and every reference to "Guernsey" in this part of the report covers Alderney.

144. Guernsey's tax laws provide the competent authority with broad access powers to information foreseeably relevant for EOI purposes. Guernsey's competent authority has powers to obtain ownership, identity and accounting information, whether it is required to be kept under the Income Tax Law or other laws, and whether or not it is required to be kept. It can obtain information from any person who has in his possession or power of such information. Guernsey also has access to bank information for EOI purposes. In most cases, this power is exercised by issue of a notice requesting the production of the information, or document and non-compliance can be sanctioned with significant penalties. The competent authority also has the power to obtain a warrant to search premises and to seize information. As to the attorney-client privilege, Guernsey's laws provide that documents subject to the legal professional privilege (and information contained therein) do not have to be disclosed to the Director of Income Tax or pursuant to a court order.

145. The rights and safeguards that apply to persons in Guernsey appear to be compatible with effective exchange of information.

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**B.1. Competent Authority's ability to obtain and provide information**

Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information).

146. Guernsey's competent authority is the Director of Income Tax. His functions include the "obtaining and exchanging of information" pursuant to an "approved international agreement".<sup>41</sup> All Tax Information Exchange Agreements (TIEAs) signed by Guernsey (except the one recently concluded with Portugal, which is currently in the process of ratification) meet this definition, while Guernsey's current Double Tax Conventions (DTCs) do not. Therefore, to date, the competent authority can use its information gathering powers to answer an EOI request from the seven Nordic jurisdictions, Australia, Ireland, the Netherlands, the United Kingdom and the United States (*i.e.* jurisdictions with which Guernsey has concluded a TIEA which is approved and in force<sup>42</sup>), but cannot use its information gathering powers to answer any request from Jersey. The authorities of Guernsey indicated that the States would be asked to specify that the DTC with Jersey, which will shortly commence re-negotiation, is an "approved international agreement"; and the same would apply to any DTC that Guernsey is negotiating or would negotiate with any other jurisdiction.

147. Before gathering information, the competent authority must be satisfied that the request for information is made in accordance with the provisions of, and for the purpose of, the TIEA pursuant to which the request is made (section 75C(2)). An amendment to the Income Tax Law not yet in force would substitute section 75C(2) with a new section 75CA pursuant to which the competent authority may not exercise the information gathering powers contained in sections 75A and 75B in order to comply with a request received

41. Pursuant to section 205(2) of the Income Tax Law, the Director of Income Tax's functions include, for the purposes of the implementation and administration of any approved international agreement (within the meaning of section 75C), the obtaining and exchanging of information in relation to (a) income tax, or (b) tax of a class or description set out in the agreement. Section 75C expressly authorises the Director of Income Tax to use his information gathering powers for EOI purposes based on a TIEA.

42. The same will apply to France, Germany, New Zealand, and Portugal once the respective TIEAs enter into force (see more detailed explanation under paragraphs 161 and following below).

under a TIEA unless the request has previously been reviewed by a Member of the Guernsey Tax Tribunal (an independent body) and who has confirmed that he is content that the formal and procedural requirements of the TIEA have been met. The forthcoming amendment to the Income Tax Law does not provide any specific timeline, therefore, in the absence of any provision, an effective access to the information could be affected (see section C.5 below).

***Ownership and identity information (ToR B.1.1) and Accounting records (ToR B.1.2)***

148. Guernsey's competent authority has broad information gathering powers, as set out in sections 75A to 75Q of the Income Tax Law.<sup>43</sup> The competent authority may by notice in writing require a person to provide him with documents and furnish information deemed to be relevant to any liability to tax to which that person or another person may be subject, or the amount thereof (section 75A and 75B).

149. The competent authority may obtain information from a taxpayer (or any other person) who has in his possession or power any information or document falling within the scope of an EOI request, whether or not the person is legally required to keep that information or documents.<sup>44</sup> The law does not limit the type of document or information that may be requested, and therefore all ownership, identity and accounting information can be accessed.

150. Third parties from whom information can be requested include States departments and their officers, for example the GFSC, the Registrar and other similar regulatory bodies. They also include banks and any person acting in an agency or fiduciary capacity such as nominees and trustees.

151. The competent authority can require not only documents or information, but he can also require a taxpayer or third party to give an explanation of, and to answer questions relating to, any document or information produced, and convoke them for that purpose.

152. Any person who fails to comply with a notice issued under sections 75A or 75B, and who does not do so without reasonable excuse, is guilty of an offence. On summary conviction they are liable to a fine not exceeding GBP 20 000 and to a further fine not exceeding GBP 2 000 for each day that the failure continued after conviction. In addition, if a person intentionally falsifies, conceals, destroys or otherwise dispose of a document which has been requested by an informal request or a notice of the Director of Income

43. In June 2009, the Director of Income Tax issued A Guide to Income Tax Information Powers, published on the internet. Without legal status, this Guide explains what information gathering powers are available to the Director.
44. This covers information held by anyone for anti-money laundering purposes.

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Tax, or by a court order, he is punishable by imprisonment up to two years and/or a fine up to GBP 20 000. The same sanction is applicable against persons who knowingly or recklessly make statements or provide information which are false, deceptive or misleading (section 75L).

153. Pursuant to sections 75A(2) and 75B(3), the Director of Income Tax must systematically request information informally before issuing a formal request, unless he believes that that would prejudice the inquiry. Although the law does not distinguish between inquiries related to domestic or international tax purposes, the Guide to Income Tax Information Powers indicates that the Director will normally have to use his formal powers to provide information to another jurisdiction. Guernsey's authorities clarify that this is particularly the case when information is held by accountants, fiduciaries and others owing a duty of confidentiality to their clients.

*Use of information gathering measures absent domestic tax interest (ToR B.1.3)*

154. The information gathering powers of the competent authority are not subject to Guernsey requiring such information for its own tax purposes.

*Compulsory powers (ToR B.1.4)*

155. In addition to the power to issue notices mentioned above, the Director of Income Tax can apply for a court order, and ask the Bailiff to issue a search warrant (instead of making an order).

156. First, the competent authority may ask the Royal Court to make an order for the delivery of documents, information or explanations (section 75E to 75H). The order can be issued against a taxpayer or a third party, when they have not complied with a notice from the competent authority, or the information or documents provided are false or incomplete. It can also be issued when the competent authority is satisfied that there are reasonable grounds for suspecting that if such a notice was served, it would not be complied with, documents would be destroyed or falsified, or this would seriously prejudice the performance of the Director's functions.

157. Second, pursuant to section 75I of the Income Tax Law, the competent authority can in serious cases ask the Bailiff (*i.e.* President of the Royal Court) to issue a warrant, authorising him to enter and search premises, and to seize documents. The Bailiff may issue such a warrant if he is satisfied that a Court order has been made but there are reasonable grounds for suspecting that it has not been complied with, or any information or document furnished pursuant thereto is false, misleading, inaccurate or incomplete; or that there are reasonable grounds for suspecting that if a Court order were made, it



would not be complied with, relevant documents would be destroyed or falsified, or the making of the order might significantly prejudice an inquiry.

158. Failure to comply with a court order amounts to a contempt of court punishable by a fine or imprisonment. Similarly, a person who obstructs the search is punishable with a fine up to GBP 20 000 and/or imprisonment up to one year.

### *Secrecy provisions (ToR B.1.5)*

#### *Confidentiality rules – corporate secrecy*

159. Section A.1 noted that some ownership and identity information is confidential. The confidentiality of this information is sometimes lifted in the Companies Law itself. For instance, a director's residential address is not freely publicly available in cases where the address in the register is a service address. In those circumstances, disclosure of the address is permitted if required by the Director of Income Tax for the proper exercise of his functions (Guernsey Companies Law, section 151).

160. For the other provisions, section 75M of the Income Tax Law lifts the duty of confidentiality of any person imposed by statute, contract or otherwise, to allow them to answer a notice for the production of documents or information from the competent authority or a court order. Thus the confidentiality obligation or restriction is not contravened by the making of a disclosure pursuant to a notice, order or warrant as described in section B above. Similarly, when the competent authority directs a person to not disclose to any person the existence of the notice, this person must comply with this direction notwithstanding any contractual or other obligation to which the person is subject (see section B.2 below).

161. The competent authority can therefore have access to all the information qualified as confidential in section A of this report. For instance resident agents will have to disclose beneficial ownership information about a company to the competent authority even though the Companies Law does not list the Director of Income Tax in the list of persons that have access to the information (section 490). Section 75M also applies to accountants and auditors.

162. As for attorney-client privilege in Guernsey and Alderney, Section 75D indicates that documents subject to the legal professional privilege (and information contained therein) do not have to be disclosed to the Director of Income Tax or pursuant to a court order. This covers any communication between a professional legal adviser (*i.e.* advocate or solicitor) and his client, or between the legal adviser or his client and any other person, made

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in connection with the giving of legal advice or legal proceedings. Items held with the intention of furthering a criminal purpose are not items subject to legal professional privilege.

163. This definition appears to include not only information enclosed within a communication between an attorney and client but also within a communication between a client and another person who is not an attorney-at-law, which is beyond the exemption for attorney-client privilege under the international standard. This issue will be followed up in Phase 2 of the review process.

#### *Bank secrecy*

164. A customary/common law duty of confidentiality imposes an obligation on banks to keep their customers' affairs confidential. In addition, the Banking Supervision Law provides for confidentiality with regards to banking information under sections 43 to 45. Likewise, the Fiduciaries Law also contains provision on confidentiality of information obtained by the licensed fiduciaries under section 43.<sup>45</sup> Section 75M of the Income Tax Law lifts the duty of confidentiality of banks and fiduciaries imposed by statute, contract or otherwise, to allow them to answer a notice for the production of documents or information from the competent authority or a court order. The information gathering powers of the competent authority described above apply equally to banks, or any other financial institution, as they would do to any other person who is subject to these provisions.

165. Personal data is also protected under the Data Protection (Bailiwick of Guernsey) Law, 2001, which incorporates the principles of the EU Data Protection Directive (95/46/EC). Nevertheless, section 29 expressly exempts personal data processed for the purpose of assessment or collection, within or outside the Bailiwick, of any tax or duty or of any imposition of a similar nature.

#### Determination and factors underlying recommendations

Phase 1 Determination
The element is in place.

45. In both laws, disclosure of information is permitted "for the purpose of enabling or assisting a relevant supervisory authority in a country outside the Bailiwick to exercise its functions" (section 44(f)).

**B.2. Notification requirements and rights and safeguards***Not unduly prevent or delay exchange of information (ToR B.2.1)*

166. Rights and safeguards should not unduly prevent or delay effective exchange of information. For instance, notification rules should permit exceptions from prior notification (e.g. in cases in which the information request is of a very urgent nature or the notification is likely to undermine the chance of success of the investigation conducted by the requesting jurisdiction).

*Notification and “tipping-off”*

167. The Income Tax Law contains no provisions requiring notification of the person who is the object of a request for information. On the contrary, it expressly provides for the possibility to prevent the taxpayer from being aware of the information gathering activities taking place. The competent authority may direct a third party to whom he requests information that he must not disclose to any person (including the taxpayer) any information which is likely to prejudice the inquiry to which the notice relates or the performance by the competent authority of his functions. Thus, for example, the competent authority is able to require a bank to not disclose to the concerned account-holder or his accountant that a request for information has been made. Failure to respect this obligation is punishable on summary conviction to a fine up to GBP 10 000, unless the third party can show that he took all reasonable precautions to avoid the disclosure (section 75B). The same anti tipping-off provision applies concerning court orders.

168. This provision is however subject to the appeal rights of the third party to which the notice is made. In this case, the appeal is heard in court in public and the taxpayer may be aware of the procedure.

169. Whilst it is not a requirement of the Income Tax Law, the Director of Income Tax has decided that where a request for information has been made under an international agreement with another territory, he will only make a direction that the third party is prevented from disclosing if:<sup>46</sup>

- there is a similar “no tipping-off” provision in the domestic tax legislation of the other territory,
- that territory confirms that it would exercise that power if it received a request for information from Guernsey, in similar circumstances,

46. “A Guide to Income Tax Information Powers – what they are and when and how they will be used”.

## 56 – COMPLIANCE WITH THE STANDARDS: ACCESS TO INFORMATION

- the other territory has specifically asked for the “no tipping-off” direction to be made, and
- the other territory has confirmed that disclosure would seriously prejudice the assessment or collection of tax in the other territory.

170. This rule appears to be in conformity with the OECD Model TIEA, which states that the requesting jurisdiction must state that the request is in conformity with its law and administrative practices. The interpretation and implementation of the last condition should nonetheless be monitored in Phase 2 of the review process to ensure that it is not restrictively applied. In particular, Guernsey’s competent authority should ensure that this would not unduly prevent or delay effective exchange of information. For instance, the “serious prejudice” condition should apply in cases in which the request is of a very urgent nature or the notification is likely to undermine the chance of success of an ongoing investigation.

*Appeal rights*

171. The Income Tax Law contains appeal rights to the Royal Court against the decisions of the competent authority (section 75K). Any person to whom the competent authority has given a notice may within ten days (30 days pursuant to a pending Bill), apply for the consent of the Bailiff to an appeal. The decision of the Bailiff may itself be appealed against to the Court of Appeal within seven days. Guernsey’s authorities explain that the Bailiff’s consent is required, in order to ensure that appeals are not lodged on improper grounds<sup>47</sup> or designed to delay or frustrate the investigative powers of the competent authority. Ultimately, the decision of the Royal Court can be appealed to the Court of Appeal.

172. The notice of the competent authority is of no effect as long as the appeal is not decided upon by the Bailiff or the Court, unless the Court decides otherwise.

**Determination and factors underlying recommendations**

Phase 1 Determination
The element is in place.

47. The main grounds for an appeal are that the decision to issue a notice was outside the competent authority’s powers, beyond the scope of the law, or unreasonable in law. These appeals rights are the same for domestic and international tax purposes.



## C. Exchanging Information

### Overview

173. Jurisdictions generally cannot exchange information for tax purposes unless they have a legal basis or mechanism for doing so. A jurisdiction's practical capacity to effectively exchange information relies both on having adequate mechanisms in place as well as an adequate institutional framework. This section of the report examines whether Guernsey<sup>48</sup> has a network of information exchange that would allow it to achieve effective exchange of information in practice.

174. On 21 February 2002, Guernsey made a political commitment to co-operate with the OECD initiative on transparency and effective exchange of information. Since 2008, Guernsey has actively sought to extend its network of EOI agreements, and has signed 15 further agreements in addition to the pre-existing agreement with the United States which was concluded in 2002. In total, Guernsey has signed TIEAs with 16 jurisdictions, of which 12 are now in force. Guernsey continues to actively develop its EOI network. When Guernsey will have concluded and signed TIEAs and DTC currently under discussions, Guernsey's EOI network will cover a significant number of relevant partners.

175. The TIEAs signed by Guernsey generally follow the OECD Model TIEA; however in some instances provisions are included which may potentially have the effect of applying the agreement more narrowly than the international standard (see below). The interpretation and application of such provisions will be monitored in Phase 2 of the review process. The confidentiality of information exchanged with Guernsey is protected by obligations imposed under the TIEAs, as well as in its domestic legislation (oath of secrecy), and is supported by sanctions for non-compliance. The restrictions

48. As noted in the introduction, Guernsey and Alderney are a single jurisdiction for taxation purposes. They have a single competent authority and all EOI mechanism cover Alderney; every reference to "Guernsey" thereafter cover Alderney.

## 58 – COMPLIANCE WITH THE STANDARDS: EXCHANGING INFORMATION

to exchange of certain types of information in accordance with the international standards, such as business or professional secrets, or information the subject of attorney-client privilege, or where the disclosure of the information requested would be contrary to public policy, are also incorporated in domestic law as well as in its TIEAs.

### C.1. Exchange of information mechanisms

Exchange of information mechanisms should allow for effective exchange of information.

176. Guernsey<sup>49</sup> is signatory to TIEAs with 16 jurisdictions: Australia, Denmark, Faroe Islands, Finland, France, Germany, Greenland, Iceland, Ireland, the Netherlands, New Zealand, Norway, Portugal, Sweden, the United Kingdom and the United States. It is also a signatory to two DTCs containing EOI articles that do not meet the international standards with Jersey and the United Kingdom, in particular because Guernsey's competent authority cannot exercise its information gathering powers to answer requests made based on these treaties.<sup>50</sup>

177. In addition, since 2005, Guernsey has agreed to implement measures equivalent to those contained in the EU Directive on the Taxation of Savings Income (2003/48/EC). As a result, Guernsey has entered into reciprocal bilateral agreements with each EU Member State. Those agreements provide for (i) a withholding tax to be levied in respect of interest and similar payments made to residents of EU Member States or (ii) information to be exchanged automatically where the taxpayer has made a voluntary disclosure. As from July 2011, Guernsey will fully move to automatic exchange of information between Guernsey and the competent authority of the jurisdictions in which the beneficial owners of such interest and similar payments reside.

49. The TIEAs provide that "Guernsey" means Guernsey, Alderney and Herm, including the territorial sea adjacent to those islands, in accordance with international law." They do not specify whether Jethou is included.

50. As mentioned on Part B above, those DTCs, which date from the 1950s, have not been incorporated as "approved international agreement" by Ordinance under domestic tax law. In any event, the provision on exchange of information (Article 10) does not conform to the international standards as it does not follow Article 26 of the Model Convention: "The taxation authorities of Guernsey and [Jersey/ the UK] shall exchange such information (being information available under their respective taxation laws) as is necessary for carrying out the provision of this Arrangement or for the prevention of fraud or the administration of statutory provisions against legal avoidance in relation to taxes which are the subject of this Arrangement..."

*Foreseeably relevant standard (ToR C.1.1)*

178. The international standard for exchange of information envisages information exchange upon request to the widest possible extent. Nevertheless it does not allow “fishing expeditions”, i.e. speculative requests for information that have no apparent nexus to an open inquiry or investigation. The balance between these two competing considerations is captured in the standard of “foreseeable relevance” which is included in Article 1 of the OECD Model TIEA, set out below:<sup>51</sup>

*The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement. Such information shall include information that is foreseeably relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters.*

179. There are a number of provisions found in Guernsey’s TIEAs which may have the effect of departing from the standard. In almost all of Guernsey’s TIEAs (except for the one with France), a provision is included which provides:<sup>52</sup>

*The [competent authority of the] requesting party shall only make a request for information pursuant to this Article when it is unable to obtain the requested information by other means, except where recourse to such means would give rise to disproportionate difficulty. (emphasis added)*

180. Whilst similar, this is an important variation on the statement required by Article 5(5)(g) of the OECD Model TIEA, which refers to “all means available in its own territory”. Under the wording contained in Guernsey’s TIEAs, this could capture other means including, e.g. TIEAs with other jurisdictions. That is, it may have the effect that until a requesting party has sought the information from its other relevant EOI partners, it may not make an EOI request to Guernsey. Guernsey’s authorities have, however, indicated that they would not interpret the language in this way; to make the position clear, they intend to send a note to all current and prospective TIEA partners confirming this. The interpretation and application of such TIEAs provisions will be monitored in Phase 2 of the review process.

51. Article 26(1) of the Model Tax Convention contains a similar provision.

52. In addition to this wording, all the TIEAs signed by Guernsey also require the requesting party to make a statement to this effect which is equivalent to Article 5(5)(g) of the OECD Model TIEA.

## 60 – COMPLIANCE WITH THE STANDARDS: EXCHANGING INFORMATION

181. Under most of the TIEAs concluded by Guernsey, the requested party is under no obligation “to provide information which is neither held by the authorities nor in the possession of nor obtainable by persons who are within its territorial jurisdiction”. The relevant provisions under those TIEAs<sup>53</sup> use the words “obtainable by” instead of the expression “in control of” used in Article 2 of the OECD Model TIEA. Guernsey’s authorities have assured that their official interpretation of the words “obtainable by” in place of “control of” does not reduce EOI and it may actually widen its effectiveness. It is also noted that the words “in control of” are missing from Article 2 of the TIEA between Guernsey and the United States. The interpretation and implementation of those TIEAs provisions will be monitored in Phase 2 of the review process.

182. In all other regards, the EOI agreements concluded by Guernsey meet the “foreseeably relevant” standard set out above and described further in the Commentary to Article 1 of the OECD Model TIEA.

*In respect of all persons (ToR C.1.2)*

183. For exchange of information to be effective it is necessary that a jurisdiction’s obligations to provide information is not restricted by the residence or nationality of the person to whom the information relates or by the residence or nationality of the person in possession or control of the information requested. For this reason the international standard for exchange of information envisages that exchange of information mechanisms will provide for exchange of information in respect of all persons.

184. The TIEA with Germany is the only one that does not contain under Article 1 the wording “with respect to persons liable [or subject] to such taxes”. Nevertheless, it is noted that the personal scope of those TIEAs is not restricted to, but rather includes, information related to such persons. Therefore, it can be concluded that none of Guernsey’s TIEAs is restricted to certain persons such as those considered resident in or nationals of one of the contracting jurisdictions, or precludes the application of EOI provisions in respect to certain types of entities.

*Obligation to exchange all types of information (ToR C.1.3)*

185. Jurisdictions cannot engage in effective exchange of information if they cannot exchange information held by financial institutions, nominees or persons acting in an agency or a fiduciary capacity. Both the OECD Model

53. Article 1 of the TIEAs with Australia, Denmark, Faroes, Finland, Greenland, Iceland, Ireland, Netherlands, Norway and Sweden; Article 2 of the TIEAs with Germany, Portugal and the United Kingdom; and Article 3 of the TIEA with New Zealand.



Convention and the OECD Model TIEA, which are primary authoritative sources of the standards, stipulate that bank secrecy cannot form the basis for declining a request to provide information and that a request for information cannot be declined solely because the information is held by nominees or persons acting in an agency or fiduciary capacity or because the information relates to an ownership interest.

186. The TIEAs concluded by Guernsey (usually under Article 4.4 or 5.4) explicitly forbid the requested jurisdiction to decline to supply the information requested solely because it is held by a financial institution, nominee or person acting in an agency or a fiduciary capacity, or because it relates to ownership interests in a person.

*Absence of domestic tax interest (ToR C.1.4)*

187. The concept of "domestic tax interest" describes a situation where a contracting party can only provide information to another contracting party if it has an interest in the requested information for its own tax purposes. A refusal to provide information based on a domestic tax interest requirement is not consistent with the international standard. EOI partners must be able to use their information gathering measures even though invoked solely to obtain and provide information to the requesting jurisdiction.

188. All of the TIEAs concluded by Guernsey (usually under Article 4.2 or 5.2) explicitly permit the information to be exchanged, notwithstanding that it may not be required for a domestic tax purpose. Similarly, Guernsey's domestic powers to access relevant information are not constrained by a requirement that the information must be required for a domestic tax purpose.

*Absence of dual criminality principles (ToR C.1.5)*

189. The principle of dual criminality provides that assistance can only be provided if the conduct being investigated (and giving rise to the information request) would constitute a crime under the laws of the requested country if it had occurred in the requested country. In order to be effective, exchange of information should not be constrained by the application of the dual criminality principle.

190. None of the TIEAs concluded by Guernsey apply the dual criminality principle to restrict the exchange of information.

## 62 - COMPLIANCE WITH THE STANDARDS: EXCHANGING INFORMATION

***Exchange of information in both civil and criminal tax matters  
(ToR C.1.6)***

191. Information exchange may be requested both for tax administration purposes and for tax prosecution purposes. The international standard is not limited to information exchange in criminal tax matters but extends to information requested for tax administration purposes (also referred to as "civil tax matters").

192. All of the TIEAs concluded by Guernsey explicitly or implicitly provide for the exchange of information in both civil and criminal tax matters.

***Provide information in specific form requested (ToR C.1.7)***

193. In some cases, a Contracting State may need to receive information in a particular form to satisfy its evidentiary or other legal requirements. Such forms may include depositions of witnesses and authenticated copies of original records. Contracting States should endeavour as far as possible to accommodate such requests. The requested State may decline to provide the information in the specific form requested if, for instance, the requested form is not known or permitted under its law or administrative practice. A refusal to provide the information in the form requested does not affect the obligation to provide the information.

194. All of the TIEAs concluded by Guernsey (usually under Article 4.3 or 5.3) allow for information to be provided in the specific form requested, to the extent allowable under the requested jurisdiction's domestic laws.

***In force (ToR C.1.8)***

195. Exchange of information cannot take place unless a jurisdiction has EOI arrangements in force. Where EOI arrangements have been signed, the international standard requires that jurisdictions must take all steps necessary to bring them into force expeditiously.

196. Guernsey has signed 16 agreements which allow for the exchange of information for tax purposes (all TIEAs), out of which 12 are now in force. As regards the other four TIEAs, one was very recently signed (with Portugal, on 9 July 2010) and Guernsey informed that it has completed all domestic steps necessary to bring the other three TIEAs into force (*i.e.* approval by an Ordinance making the TIEA an "approved international agreement" for the purposes of section 75C of the Income Tax Law). The status of these TIEAs, as well as the TIEAs which Guernsey has concluded but not yet signed, or has substantially concluded, is set out in Annexe 2.

*Be given effect through domestic law (ToR C.1.9)*

197. For information exchange to be effective the parties to an exchange of information arrangement need to enact any legislation necessary to comply with the terms of the arrangement.

198. The United Kingdom has constitutional responsibility for the defence and international relations of the Crown Dependencies. However, in certain circumstances, the Crown Dependencies may be authorised to represent their own interests internationally by a process of entrustment, through letters of entrustment from the UK Government. A Letter of Entrustment is a formal means by which Her Majesty's government transfers the competence to conclude international agreements to Guernsey. To date, this has occurred in relation to the process of concluding Guernsey's agreements with the 27 EU Member States in accordance with the Directive on the Taxation of Savings Income (2003/48/EC) and for the purposes of concluding TIEAs with OECD, G20 and EU members, as well as jurisdictions that have substantially implemented the internationally agreed tax standard according to the Progress Report (see [www.oecd.org/site/0,3407,en\\_21571361\\_43854757\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/site/0,3407,en_21571361_43854757_1_1_1_1_1,00.html)). New letters of entrustments can be solicited to conclude TIEAs with other jurisdictions.

199. Section 75C(4) of the Income Tax Law indicates that an EOI agreement or arrangement made between the States of Guernsey and the government of another territory is considered as "approved" when it is "specified... by Ordinance of the States". Guernsey's authorities explain that this Ordinance is usually enacted as part of the ratification process upon signing of the TIEA. Except for the TIEA recently signed with Portugal in July 2010 (which is shortly to be approved by Ordinance), all of the TIEAs signed by Guernsey to date were approved by an Ordinance and are therefore considered "approved international agreements" under section 75C of the Income Tax Law.

200. In addition, Guernsey is discussing possible revisions to the DTC with Jersey, and any such revised agreement is likely to contain exchange of information provisions equivalent to Article 26 of the OECD Model Convention, or equivalent to those contained in Guernsey's TIEAs. Guernsey's authorities noted their intention to specify such a revised DTC with Jersey as an "approved international agreement". Similarly, the same would apply with respect to any DTC concluded by Guernsey in the future. Guernsey's authorities do not consider, therefore, that any amendment is required to the legislation in this regard. The approval of future or amended DTCs by an Ordinance should be monitored in Phase 2 of the review process.

## 64 – COMPLIANCE WITH THE STANDARDS: EXCHANGING INFORMATION

**Determination and factors underlying recommendations**

Phase 1 Determination	
The element is in place.	
Factors underlying recommendations	Recommendations
The DTC between Guernsey and Jersey only provides for the exchange of information which is available to the competent authorities under their respective income tax laws.	Guernsey should commence negotiations with Jersey and ensure that the revised agreement includes exchange of information provisions in line with Article 26 of the Model Convention, or equivalent to those contained in Guernsey's TIEAs.

**C.2. Exchange of information mechanisms with all relevant partners**

The jurisdictions' network of information exchange mechanisms should cover all relevant partners.

201. Ultimately, the international standard requires that jurisdictions exchange information with all relevant partners, meaning those partners who are interested in entering into an information exchange arrangement. Agreements cannot be concluded only with counterparties without economic significance. If it appears that a jurisdiction is refusing to enter into agreements or negotiations with partners, in particular ones that have a reasonable expectation of requiring information from that jurisdiction in order to properly administer and enforce its tax laws it may indicate a lack of commitment to implement the standards.

202. In application of its policy decision to expand its EOJ network, Guernsey has written to all OECD, G20, EU (as well as some other relevant) jurisdictions, with which it did not already have a DTC or a TIEA, inviting those jurisdictions to enter into negotiations. In addition to the 16 TIEAs signed with Global Forum members (out of which six are G20 countries), negotiations have been held with 12 Global Forum jurisdictions (out of which 10 are G20 countries), and the text of a TIEA has been agreed or substantially agreed (see Annexe 2). Negotiations with six new jurisdictions (five of which are Global Forum members) are expected to be concluded during the second half of 2010. Requests to negotiate TIEAs were declined or have not been responded to by another seven jurisdictions. In addition, Guernsey has approached a number of jurisdictions to propose the negotiation of a TIEA or DTC, and most of them are considering Guernsey's offer, including other financial centres and other Crown dependencies.



203. However, it is noted that Guernsey has been unable to negotiate either a TIEA or DTC with some main trading and financial partner jurisdictions, which have not responded to Guernsey's invitation as of yet.

204. Comments were sought from the jurisdictions participating in the Global Forum in the course of the preparation of this report, and no jurisdiction advised the assessment team that Guernsey had refused to negotiate or conclude a TIEA with it.

#### Determination and factors underlying recommendations

Phase 1 Determination	
The element is in place.	
Factors underlying recommendations	Recommendations
Guernsey is actively seeking to expand its network of information exchange mechanisms.	Guernsey should continue to develop its EOI network with all relevant partners.

### C.3. Confidentiality

The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received.

205. Governments would not engage in information exchange without the assurance that the information provided would only be used for the purposes permitted under the exchange mechanism and that its confidentiality would be preserved. Information exchange instruments must therefore contain confidentiality provisions that spell out specifically to whom the information can be disclosed and the purposes for which the information can be used. In addition to the protections afforded by the confidentiality provisions of information exchange instruments, jurisdictions with tax systems generally impose strict confidentiality requirements on information collected for tax purposes.

206. The TIEAs concluded by Guernsey meet the standards for confidentiality including the limitation on disclosure of information received and use of the information exchanged, which are reflected in Article 8 of the OECD Model TIEA. These confidentiality obligations form part of Guernsey's domestic law by the incorporation of Guernsey's TIEAs into its domestic law, and are also reflected in specific domestic provisions.

## 66 - COMPLIANCE WITH THE STANDARDS. EXCHANGING INFORMATION

207. In addition to the confidentiality duties described above, the use and disclosure of information by the Income Tax Office is governed by Guernsey's Data Protection Law and the Code of Practice on Data Protection,<sup>54</sup> which incorporates the principles of the EU Data Protection Directive (95/46/EC).

*All other information exchanged (ToR C.3.2)*

208. Confidentiality rules should apply to all types of information exchanged, including information provided in a request, information transmitted in response to a request and any background documents to such requests.

209. All persons who are concerned with tax matters in Guernsey are required, under section 206 of the Income Tax Law, to take an oath of secrecy. A person violating the oath is guilty of an offence and liable on conviction to imprisonment for a term not exceeding six months and/or to a fine not exceeding GBP 5 000. The secrecy obligation does not prevent, however, the competent authority exchanging information with any person, body or authority for the purposes of a TIEA, pursuant to section 205(3) of the Income Tax Law.

**Determination and factors underlying recommendations**

Phase 1 Determination
The element is in place.

**C.4. Rights and safeguards of taxpayers and third parties**

The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties.

*Exceptions to requirement to provide information (ToR C.4.1)*

210. The international standard allows requested parties not to supply information in response to a request in certain identified situations where an issue of trade, business or other listed secret may arise.

211. Among other reasons, an information request can be declined where the requested information would disclose confidential communications protected by the attorney-client privilege. Attorney-client privilege is a feature of the legal systems of many jurisdictions. However, communications between a client and an attorney or other admitted legal representative are, generally,

54. [www.gov.gg/ccm/treasury-and-resources/income-tax/website/publications/codes-of-practice/data-protection.en](http://www.gov.gg/ccm/treasury-and-resources/income-tax/website/publications/codes-of-practice/data-protection.en).

only privileged to the extent that the attorney or other legal representative acts in his or her capacity as an attorney or other legal representative. Where attorney-client privilege is more broadly defined it does not provide valid grounds on which to decline a request for exchange of information. To the extent, therefore, that an attorney acts as a nominee shareholder, a trustee, a settlor, a company director or under a power of attorney to represent a company in its business affairs, exchange of information resulting from and relating to any such activity cannot be declined because of the attorney-client privilege rule.

212. The limits provided for in the OECD Model TIEA and Article 26 of the OECD Model Tax Convention on information which can be exchanged are included in each of the TIEAs concluded by Guernsey. That is, information which is subject to legal privilege; which would disclose any trade, business, industrial, commercial or professional secret or trade process; or which would be contrary to public policy, is not required to be exchanged.

213. In respect of rights and safeguards of persons, the OECD Model TIEA provides that they remain applicable "to the extent that they do not unduly prevent or delay effective exchange of information". In contrast, some of the TIEAs signed by Guernsey<sup>55</sup> provide that a requested party "shall use its best endeavours" to ensure that they do not so unduly prevent or delay effective EOI. It is also noted that the TIEA with Portugal does not make any provision to circumscribe rights and safeguards found in domestic law. Nevertheless, it is unlikely that this variation will materially affect the exchange of information to the international standards.

#### Determination and factors underlying recommendations

Phase 1 Determination
The element is in place.

#### C.5. Timeliness of responses to requests for information

The jurisdiction should provide information under its network of agreements in a timely manner.
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##### *Responses within 90 days (ToR C.5.1)*

214. In order for exchange of information to be effective, it needs to be provided in a timeframe which allows tax authorities to apply the information to the relevant cases. If a response is provided but only after a significant

55. With Germany, the United Kingdom and the United States.

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lapse of time, the information may no longer be of use to the requesting authorities. This is particularly important in the context of international cooperation as cases in this area must be of sufficient importance to warrant making a request.

215. None of Guernsey's TIEAs require the provision of request confirmations, status updates or the provision of the requested information, within the timeframes foreshadowed in Article 5(6) of the OECD Model TIEA. Instead, they<sup>56</sup> provide that the requested Party shall use its best endeavours to forward the requested information to the requesting Party: (i) "with the least possible delay" (Australia, New Zealand); (ii) "with the least reasonable delay" (France, Germany, Ireland, the Netherlands, Portugal, the United Kingdom); or (iii) "as soon as possible" (Denmark, Faroe Islands, Finland, Greenland, Iceland, Norway, Sweden)".

216. As such there appear to be no legal restrictions on the ability of Guernsey's competent authority to respond to requests within 90 days of receipt by providing the information requested or by providing an update on the status of the request. A review of the practical ability of Guernsey's tax authorities to respond to requests in a timely manner will be conducted in the course of its Phase 2 review.

*Organisational process and resources (ToR C.5.2)*

217. A review of Guernsey's organisational process and resources will be conducted in the context of its Phase 2 review.

*Absence of restrictive conditions on exchange of information (ToR C.5.3)*

218. Exchange of information assistance should not be subject to unreasonable, disproportionate, or unduly restrictive conditions.

219. Under section 75C(2) of the Income Tax Law, before gathering information, the competent authority must be satisfied that the request for information is made in accordance with, and for the purpose of, the TIEA pursuant to which the request is made. This includes, in particular ensuring that:

- the requesting Party is only asking for information that is foreseeably relevant to the administration and enforcement of its domestic laws concerning taxes covered by the TIEA;

56. The TIEA with the US contains no provisions on the acknowledgement of receipt or the expediency to forward the information within a reasonable timeframe.



- the information requested is held by the authorities in Guernsey or is in the possession of, or obtainable by, a person within the territorial jurisdiction of Guernsey;
- the requesting Party has provided all of the information that it is required to provide when making a request, as set out in the Article "Exchange of Information Upon Request"; and
- the circumstances in which Guernsey may decline to exchange information detailed in the Article "Possibility of Declining a Request" are not present.

220. An amendment to the Income Tax Law not yet in force<sup>57</sup> would substitute section 75C(2) with a new section 75CA pursuant to which the competent authority may not exercise the information gathering powers to comply with an EOI request received under a TIEA unless the request has previously been reviewed by a Member of the Guernsey Tax Tribunal (an independent body) to ensure that the request meets the formal and procedural terms of the TIEA. The Tribunal Member reviewing the request is not required to look at the substantive issues underlying the request.

221. The forthcoming amendment to the Income Tax Law does not provide any specific timeline and it is unclear from this Phase 1 assessment whether the additional safeguards described above will result in an unduly restrictive condition which may prevent Guernsey from fully complying with its obligations under the TIEAs. In this regard, Guernsey has expressed its willingness to enter into obligations to observe specified time limits, if so required to meet the international standards. Guernsey believes that the most appropriate instrument could be a Protocol to the TIEA or a Memorandum of Understanding between the competent authorities, as already agreed with Australia. The implementation of the new procedure under section 75CA, when in force, should be monitored in Phase 2 of the review process.

#### Determination and factors underlying recommendations

Phase 1 Determination
The assessment team is not in a position to evaluate whether this element is in place, as it involves issues of practice that are dealt with in the Phase 2 review.

57. The Income Tax (Guernsey) (Amendment) Law, 2008; approved by the States of Deliberation, the amendment awaits Royal Assent by the Queen in Council.

## Summary of Determinations and Factors Underlying Recommendations

Determination	Factors underlying recommendations	Recommendations
Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities. <i>(ToR A.1)</i>		
The element is in place		
Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements. <i>(ToR A.2)</i>		
The element is in place, but certain aspects of the legal implementation of the element need improvement	Obligations to maintain reliable accounting records including underlying documents in line with the Terms of Reference are not consistently in place for relevant entities and arrangements in all instances.	Introduce consistent obligations for all relevant entities and arrangements to maintain reliable accounting records, including underlying documents in line with the Terms of Reference.
	There is currently no express obligation for companies deriving their income from sources other than businesses and property to keep underlying documents for more than two years nor trustees deriving their income from sources other than businesses and property to keep accounting records and underlying documents for more than two years.	Clarify binding requirements on companies deriving their income from sources other than businesses and property to keep underlying documents for at least five years and on trustees deriving their income from sources other than businesses and property to keep accounting records and underlying documents for at least five years.
Banking information should be available for all account-holders. <i>(ToR A.3)</i>		
The element is in place		
Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information). <i>(Tor B.1)</i>		
The element is in place		

## 72 - SUMMARY OF DETERMINATIONS AND FACTORS UNDERLYING RECOMMENDATIONS

Determination	Factors underlying recommendations	Recommendations
The rights and safeguards (e.g. notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information. (ToR B.2)		
The element is in place		
Exchange of information mechanisms should allow for effective exchange of information. (ToR C.1)		
The element is in place	The DTC between Guernsey and Jersey only provides for the exchange of information which is available to the competent authorities under their respective income tax laws.	Guernsey should commence negotiations with Jersey and ensure that the revised agreement includes exchange of information provisions in line with Article 26 of the Model Convention, or equivalent to those contained in Guernsey's TIEAs.
The jurisdictions' network of information exchange mechanisms should cover all relevant partners. (ToR C.2)		
The element is in place	Guernsey is actively seeking to expand its network of information exchange mechanisms.	Guernsey should continue to develop its EOI network with all relevant partners.
The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received. (ToR C.3)		
The element is in place		
The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties. (ToR C.4)		
The element is in place		
The jurisdiction should provide information under its network of agreements in a timely manner. (ToR C.5)		
The element is not assessed	The assessment team is not in a position to evaluate whether this element is in place, as it involves issues of practice that are dealt with in the Phase 2 review.	

## Annex 1: Jurisdiction's Response to the Review Report\*

Guernsey would like to acknowledge the considerable effort by the Assessment Team in compiling Guernsey's Phase 1 Peer Review Report. Notwithstanding the very limited timeframe within which the Assessment Team was operating, it has been open, throughout the process, to eliciting, and considering, the views of Guernsey on matters covered by the Report.

Guernsey believes that the Report clearly demonstrates its commitment to transparency and exchange of information for tax purposes, and that comprehensive legislation and other measures are in place to enable it to discharge its responsibilities under the international agreements that it has entered into, and continues to enter into, since 2002.

To further demonstrate this commitment, Guernsey is pleased to report the following progress which has been made since the effective date of the Peer Review Report (July 2010).

- The TIEA with France entered into force on 4 October 2010.
- The TIEA with New Zealand entered into force on 8 November 2010.
- Guernsey signed TIEAs with:
  - San Marino, on 29 September 2010,
  - Greece, on 8 October 2010, and
  - China, on 27 October 2010.
- In addition, Guernsey has now concluded, or virtually concluded, negotiations with a further 13 jurisdictions.

It is hoped that it will be possible for these, and hopefully other, TIEAs to be signed during the course of 2011.

As Guernsey is a common/customary law jurisdiction, it experienced particular issues, during its Phase 1 Review, concerning the lack of codification

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\* This Annex presents the Jurisdiction's response to the review report and shall not be deemed to represent the Global Forum's views.



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of certain requirements. Naturally, it is easier to ascertain the legal framework of a jurisdiction where everything is codified in laws, regulations, etc. Guernsey believes, however, that common/customary law jurisdictions should not be disadvantaged as a consequence. In the absence of codification, Guernsey believes that the Peer Review Group should have regard to the views and opinions of those qualified to speak on the common/customary law of the jurisdiction concerned.

Guernsey has already opened discussions with Jersey, concerning revisions to the existing DTC, including proposals to incorporate the equivalent of Article 26 of the Model Tax Convention.

Guernsey will now consider how best to address the other recommendations made in its Phase 1 Review, and looks forward to continuing to work with its Assessment Team in the Phase 2 Review in 2012.

## Annex 2: List of All Exchange-of-Information Mechanisms in Force

	Treaty partner	Type of Eoi arrangement	Date signed	Date in force
1	United Kingdom	DTC	1952	24/06/52
		TIEA	20/01/09	27/11/09
2	Jersey	DTC	1955	11/07/56
3	United States	TIEA	19/09/02	30/03/06
4	Netherlands	TIEA	25/04/08	11/04/09
5	Denmark	TIEA	28/10/08	06/06/09
6	Faroe Islands	TIEA	28/10/08	21/08/09
7	Finland	TIEA	28/10/08	05/04/09
8	Greenland	TIEA	28/10/08	25/04/09
9	Iceland	TIEA	28/10/08	26/11/09
10	Norway	TIEA	28/10/08	08/10/09
11	Sweden	TIEA	28/10/08	23/12/09
12	France	TIEA	24/03/09	*
13	Germany	TIEA	26/03/09	*
14	Ireland	TIEA	26/03/09	26/11/09
15	New Zealand	TIEA	21/07/09	*
16	Australia	TIEA	07/10/09	21/07/10
17	Portugal	TIEA	09/07/10	

\* The TIEAs with France, Germany and New Zealand will come into force once those countries have completed their necessary internal requirements/procedures.

### **Annex 3: List of Laws, Regulations and Other Relevant Material**

#### ***Legislation***

Companies (Guernsey) Law, 2008 ("Guernsey Companies Law")  
Companies (Alderney) Law, 1994 ("Alderney Companies Law")  
Control of Borrowing (Bailiwick of Guernsey) Ordinance, 1959  
Limited Partnerships (Guernsey) Law, 1995 ("Limited Partnerships Law")  
Limited Partnerships (Fees and Annual Return) (Guernsey) Regulations of 2008  
Partnership (Guernsey) Law, 1995 ("Partnerships Law")  
Trusts (Guernsey) Law, 2007 ("Trusts Law")  
Charities and Non Profit Organization (Registration) (Guernsey) Law, 2008  
("NPO Law")

#### ***Regulatory Framework***

Financial Services Commission (Bailiwick of Guernsey) Law, 1987  
Financial Services Commission (Site Visits) (Bailiwick of Guernsey) Ordinance,  
2008  
Banking Supervision (Bailiwick of Guernsey) Law, 1994 ("Banking Supervision  
Law")  
Protection of Investors (Bailiwick of Guernsey) Law, 1987 ("Protection of  
Investors Law")  
Insurance Business (Bailiwick of Guernsey) Law, 2002  
Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey)  
Law, 2002